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AUG 14 2017

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
PUBLIC SERVICE COMMISSION

FCC Mail Room

SHELLY EDGERTON
DIRECTOR

NORM SAARI
COMMISSIONER

SALLY A. TALBERG
CHAIRMAN

RACHAEL EUBANKS
COMMISSIONER

August 07, 2017

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington DC 20554

Mr. Mark Sweeney
Vice President High Cost and Low Income Div.
Universal Service Administration Company
2000 L Street N.W., Suite 200
Washington DC 20036

RE: Budget PrePay, Inc. Relinquishment of Universal Service Pursuant to Section 214(e)(4) of the Federal Communications Act of 1996. Federal Communications Commission CC Docket No. 96-45, CC Docket No. 09-197, WC Docket No. 10-90

Dear Ms. Dortch and Mr. Sweeney:

On May 10, 2017, Budget PrePay, Inc. (Budget Mobile) requested that its Wireless Eligible Telecommunications Carrier (ETC) certification (SAC 319034) for the purpose of receiving Lifeline support in Michigan be relinquished.

The Michigan Public Service Commission's order in Case Nos. U-16803, approving Budget Mobile's request for relinquishment is attached, and relinquishment is effective August 31, 2017.

DOCKET FILE COPY ORIGINAL

Sincerely,

Robin P. Ancona, Director
Telecommunications Director

Attachment

cc: Jessica Zufolo, USAC
Ryan McAnany, MPSC
Barry Harmon, MPSC

No. of Copies rec'd 0
List ABCDE

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STATE OF MICHIGAN

AUG 14 2017

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION FCC Mail Room

* * * * *

In the matter of the application of)
BUDGET PREPAY, INC., d/b/a BUDGET PHONE,)
for designation as an eligible telecommunications)
carrier pursuant to Section 214(e)(2) of the)
Communications Act of 1934, as amended.)
_____)

Case No. U-16803

At the July 12, 2017 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

On May 25, 2011, Budget PrePay, Inc., d/b/a Budget Phone (Budget PrePay) filed an application for designation as a wireless eligible telecommunications carrier (ETC) for purposes of receiving Lifeline universal service fund support. In the June 26, 2012 order in this docket, the Commission approved the application. Budget PrePay is a wireless ETC that receives universal service fund support for Lifeline only in the state of Michigan.

On May 10, 2017, Budget PrePay filed an application requesting to relinquish its wireless ETC status effective July 5, 2017. On October 27, 2016, Budget PrePay filed a customer transfer completion notice, informing the Commission that it had transferred a number of its wireless Lifeline customers to Boomerang Wireless, LLC, d/b/a enTouch Wireless. In the application,

Budget PrePay states that it currently has fewer than 3,000 wireless Lifeline subscribers in Michigan.

47 USC 214(e)(4) provides as follows:

A State commission...shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier...Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission...shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission...shall establish a time, not to exceed one year after [approval of] such relinquishment under this paragraph, within which such purchase or construction shall be completed.

See also, 47 CFR 54.205. Thus, relinquishment shall be granted to a carrier for any area that is served by more than one ETC. The Universal Service Administrative Company has assigned study area code 319034 to Budget PrePay to represent its ETC service area in Michigan.

Attachment A to Budget PrePay's application for relinquishment includes a list of 12 other wireless ETC providers who provide service in Budget PrePay's service area. In addition, Attachment B to the application contains a list of non-rural wire centers (AT&T Michigan, Frontier North Inc., and Frontier Midstates, Inc.) providing landline Lifeline service in Budget PrePay's service area. MCL 484.2316. Based upon the number of additional wireless ETCs providing service throughout Budget PrePay's service area, as well as landline Lifeline providers, the Commission is confident that all customers served by the relinquishing ETC will continue to receive service. The Commission believes that it is unlikely that the purchase or construction of additional facilities will be required to serve any of Budget PrePay's Lifeline customers; however, in accordance with 47 USC 214(e)(4), the Commission sets July 12, 2018, as the deadline for completion of any such purchase or construction.

According to the May 10, 2017 application, within one business day of approval of the application Budget PrePay will notify all current customers in Michigan via text message of Budget PrePay's intent to discontinue service. The Commission establishes a discontinuance date of August 31, 2017. Budget PrePay has included a sample of the text notice in the application. Budget PrePay also states that it will provide written notification by U.S. Mail to all remaining Budget PrePay Lifeline customers in Michigan, and a sample letter is included with the application. The Commission Staff (Staff) has reviewed the text notification and letter, and finds that they adequately inform customers of the pending change (however, the discontinuance date will be modified). The notices inform customers that they will need to contact another Lifeline provider if they wish to continue service, and provide a link to a list of other wireless ETC providers in Michigan. Customers are also provided with a customer assistance number to call for any questions or assistance. The Staff supports Budget PrePay's application to relinquish its wireless ETC designation.

The Commission accepts the relinquishment application of the wireless ETC designation of Budget PrePay effective August 31, 2017. The Commission requires Budget PrePay to provide text message as well as written notices to current Lifeline customers of the final date of service. The notices shall be filed in this docket, along with a notice informing the Commission that the service has officially been discontinued.

THEREFORE, IT IS ORDERED that:

- A. The eligible telecommunications carrier designation of Budget Prepay, Inc., d/b/a Budget Phone, is relinquished effective August 31, 2017.
- B. Budget Prepay, Inc., d/b/a Budget Phone, shall provide a text message notice to its Michigan Lifeline customers within one business day of the Commission's approval of this order

to inform those customers of the official date of discontinuance. A copy of the text message notice shall be filed in this docket within five business days of it being sent to customers.

C. Budget Prepay, Inc., d/b/a Budget Phone, shall also provide a second notice (written letter) via U.S. Mail to all of its Michigan Lifeline customers no later than 3 weeks before discontinuance of service. A copy of the written notice shall be filed in this docket within five business days of it being sent.

D. Budget Prepay, Inc., d/b/a Budget Phone, shall provide notice in this docket once service has officially been discontinued.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party aggrieved by this order may file an action in the appropriate federal District Court pursuant to 28 USC 1331. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION



Sally A. Talberg, Chairman



Norman J. Saari, Commissioner



Rachael A. Eubanks, Commissioner

By its action of July 12, 2017.



Kavita Kale, Executive Secretary


PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-16803

County of Ingham)

Angela McGuire being duly sworn, deposes and says that on July 12, 2017 A.D. she electronically notified the attached list of this **Commission Order** via e-mail transmission, to the persons as shown on the attached service list (Listserv Distribution List).



Angela McGuire

Subscribed and sworn to before me
this 12th day of July 2017



Lisa Felice
Notary Public, Eaton County
My Commission Expires April 15, 2020

Service List for Case Number U-16803

Name

Email Address

Michael Ashton

mashton@fraserlawfirm.com

Budget PrePay Inc

lakishat@budgetprepay.com,



Received & Inspected

AUG 14 2017

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
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August 07, 2017

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Mr. Mark Sweeney
Vice President, High Cost and Low Income Div.
Universal Service Administration Company
2000 L Street NW, Suite 200
Washington, DC 20036

Re: Assist Wireless, Inc. Certification of Wire Centers for Universal Service Support, Pursuant to Section 214(e)(2) of the Federal Communications Act of 1996, Federal Communications Commission CC Docket No. 96-45, CC Docket No. 09-197, WC Docket No. 10-90

Dear Ms. Dortch and Mr. Sweeney:

Pursuant to the requirements of 47 C.F.R. § 54.201, the Michigan Public Service Commission (MPSC) hereby certifies to the Federal Communications Commission (FCC) and the Universal Administrative Company (USAC) that Assist Wireless, Inc. (Assist) has met the current standards for state Eligible Telecommunications Carrier (ETC) designation, for the purposes of receiving Low-Income/Lifeline Voice support only in its certified areas.

Attached is the MPSC Order approving the application of Assist in case U-18348, as well as the wire centers in Assist's area.

Sincerely,

Robin P. Ancona, Director
Telecommunications Division

Attachments

- Assist ETC Order (U-18348)
- Service Area – Page 1-17

Cc: Ryan McAnany, MPSC
Barry Harmon, MPSC
Jessica Zufolo, USAC

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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of)	
ASSIST WIRELESS, INC., for designation as an)	
eligible telecommunications carrier pursuant to)	Case No. U-18348
Section 214(e)(2) of the Communications Act of)	
1934, as amended.)	
<hr/>)	

At the July 31, 2017 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

On March 24, 2017, Assist Wireless, Inc. (Assist) filed an application, pursuant to Section 214(e)(2) of the federal Communications Act of 1934, 47 USC 214(e)(2), for designation as an eligible telecommunications carrier (ETC) for access to universal service fund (USF) support for the purpose of providing wireless Lifeline-only services to customers in Michigan. Assist filed an amended application on June 27, 2017.

Assist requests that the Commission enter an order designating it as an ETC for purposes of Lifeline support only, in the wire centers listed in amended Exhibit 4 filed on June 27, 2017. Assist currently provides Lifeline service in Arkansas, Maryland, Missouri, and Oklahoma through resale of national carriers' wireless networks. Assist also currently provides Lifeline service in

Wisconsin through a network configuration consisting of a combination of Assist's own facilities and resold services of a national wireless carrier.

In Michigan, Assist is not seeking forbearance from the Federal Communications Commission's (FCC) facilities requirement. *See*, 47 USC 214(e)(1)(A). Therefore, an FCC approved compliance plan is not necessary. Assist will be using a combination of its own facilities and resale of another carrier's facilities to provide service. Assist's network configuration description is explained in amended Confidential Exhibit 2.

After reviewing Assist's application, the Commission finds that the ETC designation, limited to wireless Lifeline voice support only, should be conditionally granted. The Commission is persuaded that ETC designation for Assist promotes the availability of universal service and is in the public interest. The Commission finds that the application demonstrates that Assist meets the requirements for designation as an ETC. The application for ETC designation is granted on condition that Assist comply with the service requirements contained in FCC Report and Order 11-161 (rel'd October 27, 2011) and subsequent federal and state rulings, the *Lifeline Reform Order*,¹ and the Commission's December 20, 2012 and January 17, 2013 orders in Case Nos. U-14535 and U-16959. Additionally, the Commission issued a Minute Action on June 15, 2017 in Case U-18216, which requires action from all wireless ETC's operating in Michigan. Assist will be required to re-certify with the Commission in accordance with FCC requirements annually to retain its ETC designation.

¹ *In the Matter of Lifeline and Link Up Reform and Modernization* (WC Docket No.11-42), *Lifeline and Link Up* (WC Docket No. 03-109), *Federal-State Joint Board on Universal Service* (CC Docket No. 96-45), *Advancing Broadband Availability through Digital Literacy Training* (WC Docket No. 12-23), Report and Order and Further Notice of Proposed Rulemaking, Order No. FCC 12-11, rel'd February 6, 2012 (*Lifeline Reform Order*).

The application for ETC designation is granted on condition that Assist comply with the following:

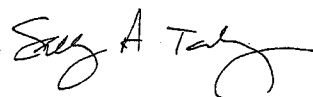
- By August 31, 2017, Assist shall submit a certification letter to each county 9-1-1 coordinator in Michigan explaining the Lifeline service, with information on Assist's product and service specifications, stating that it will be providing the 9-1-1 service to Assist's customers. No later than September 18, 2017, Assist shall file in this docket proof of service reflecting timely service of each letter.
- Assist shall provide information on a quarterly basis, based on the calendar year, to the Commission on the number of Lifeline customers it is serving and the amounts paid to individual counties and the State of Michigan for 9-1-1 surcharges.
- Assist shall advertise its Lifeline product in media of general distribution including newspaper, radio, its own website, and other direct advertising methods. The advertisement shall include information on monthly service plans and the cost of initiating service.
- Assist shall promptly notify the Commission of any future changes to its rates, terms, and conditions regarding its low-income offerings in this docket.
- Assist shall include the Commission's customer complaint telephone number on its public web page.
- Assist shall comply with the Commission's June 15, 2017 Minute Action in Case U-18216.

THEREFORE, IT IS ORDERED that the amended application filed by Assist Wireless, Inc., for designation as an eligible telecommunications carrier for purposes of Lifeline universal service support is conditionally approved.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party aggrieved by this order may file an action in the appropriate federal District Court pursuant to 28 USC 1331. To notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungpl@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION



Sally A. Talberg, Chairman



Norman J. Saari, Commissioner



Rachael A. Eubanks, Commissioner

By its action of July 31, 2017.



Kavita Kale, Executive Secretary

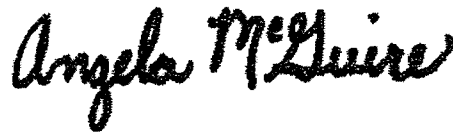
PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-18348

County of Ingham)

Angela McGuire being duly sworn, deposes and says that on July 31, 2017 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).



Angela McGuire

Subscribed and sworn to before me
This 31st day of July, 2017



Lisa Felice
Notary Public, Eaton County
My Commission Expires April 15, 2020

Service List for U-18348

Name

Michael Ashton

Assist Wireless, Inc.

Jason Danowsky

Mark Foster

Email Address

mashton@fraserlawfirm.com

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jason@mfoosterlaw.com

mark@mfoosterlaw.com

Association of Businesses Advocating Tariff Equity

ABATE's Initial Thoughts on Staff's Draft Code of Conduct Rules

- The Draft Proposed Rules apply to all utilities (and affiliates) that provide regulated and unregulated services to regulated utility customers in Michigan. *Notably, the scope of the draft rules does not, on its face, seem to apply to utilities (and affiliates) providing unregulated services to non-utility customers or to other outside of Michigan.*
- The Draft Proposed Rules require the “structural or functional” separation between regulated and unregulated services needed to prevent anticompetitive behavior. They state that (i) a utility’s provision of value added programs and services must be through an affiliate; (ii) a utility’s regulated services shall not subsidize its affiliates offering of unregulated value added services; and (iii) a utility shall maintain its books and records separately from those of its affiliates offering unregulated value-added programs and services. But, notably, the phrase “value-added programs and services” is only defined to include “programs and services that are utility or energy related, including, but not limited to, home comfort and protection, appliance service, building energy performance, alternative energy options, or engineering and construction services. Value-added programs and services do not include energy optimization or energy waste reduction programs paid for by utility customers as part of the regulated rates.” *As Michigan has effected corporate separation for transmission, this seems somewhat permissive. It could make anti-cross subsidization rules harder to follow.*
- The Draft Proposed Rules prohibit utilities and their affiliates from “sharing facilities, equipment, or operating employees” but allow the sharing of “computer hardware and software with documented protection to prevent discriminatory access to competitively sensitive information.” *The word “sharing” is vague, and the restriction does not seem to apply if a utility offers an unregulated value-added program or service as part of regulated service. Further, the Rule seems to allow utilities to “transfer” employees between the utility and affiliate AES with limited disclosure requirements? Isn’t that a giant loophole?*
- The Draft Proposed Rules prohibit utility affiliates that provided “unregulated value-added programs and services” from “engaging in joint advertising, marketing, and other promotional activities related to the provision of unregulated services” or jointly selling services with the utility. *The prohibition seems to be limited to value-added programs and services but does not encompass other ventures.*
- The Draft Proposed Rules prohibit a utility or alternative electric supplier from “unduly” discriminating in favor of or against any party, including its affiliates. *What is the difference between discriminating and unduly discriminating? Are utilities allowed to discriminate unless the discrimination rises to the level of unduly discrimination?*
- The Draft Proposed Rules do contain significant restrictions on data and information sharing with affiliates. *But utilities and affiliates are free to transfer key personal back and forth?*
- The Draft Proposed Rules do require detail annual reporting requirements. Moreover, they require certification of a corporate representative attesting to the accuracy of the information in the annual report and certifying that there is no cross-subsidization between regulated and nonregulated utility programs and services. *This is good policy. But, (i) the penalties need to be*

enough to effect deterrence and include repayment of damages to injured competitors and ratepayers; and (ii) there should be a mandatory audit every 2-3 years by an independent (i.e., no conflict) outside auditing firm.

- The Draft Proposed Rules allow the utility to request a waiver from one or more of these provision by filing an application with the Commission. *This is bad policy. It will encourage an unending string of new proceedings to try and water down whatever rules are promulgated.*
- Subsidies are prohibited from regulated to unregulated – but how are subsidies defined? Are they at fully allocated or incremental costs? This could be a big issue.

Michigan Electric Cooperative Association



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Richard J. Aaron

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Email: RAaron@dykema.com

July 28, 2017

Derrell Slaughter
Michigan Public Service Commission
Commission Analyst, Commission Office
7109 W. Saginaw Highway
Lansing, MI 48917

Re: MECA's Comments on Code of Conduct Rule

Dear Mr. Slaughter:

Enclosed please find The Michigan Electric Cooperative Association's Second Set of Comments on Draft Code of Conduct Rule.

If you have any questions, feel free to contact me. Thank you.

Sincerely,

DYKEMA GOSSETT PLLC

Richard J. Aaron

Attachment

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MICHIGAN ELECTRIC COOPERATIVE ASSOCIATION

REPLY COMMENTS ON PROPOSED CODE OF CONDUCT

On June 5, 2017, the Michigan Electric Cooperative Association (MECA) submitted comments and suggested changes to the Draft Code of Conduct (Code of Conduct). Other parties also submitted comments and suggested changes to the Code of Conduct, to which MECA submits these limited replies.

Reply to Comments of Mr. Forner

Mr. Forner proposes to define “anticompetitive behavior” and suggests that a 10% market share limit should be imposed through rulemaking. As MECA addressed in its comments, adding to the Code of Conduct the concept of “anticompetitive behavior” is too broad and exceeds the statutory directive. Section 10ee defines the scope of the Code of Conduct and does not invite expanding the Code of Conduct to include ill-defined “anticompetitive behavior.” Just because such a “bright line” may be easy to textually prohibit, as noted below, such a line is unworkable, untenable, and improper.

Mr. Forner argues that a violation of the Code of Conduct occurs when a value-added program or service captures 10% of a market within a zip code area. This 10% market share is completely arbitrary when viewed in the context of Federal antitrust analyses. See, e.g., *Antitrust Market Definition: An Integrated Approach*, Harris and Jorde, *California Law Review*, 72, 1, p 3 91984). There is also no statutory basis for 10% as opposed to 5% or 25% and no clear basis within Mr. Forner’s proposed changes to the Code of Conduct from which to determine what a “relevant market” is, or how a share of the market can be determined. Defining a market area based on a zip code for purposes of measuring market share is unrealistic. Large cities have multiple

zip codes and an 11% market share in only one zip code could be captured in a metropolitan area with proper marketing behavior in the metropolitan area generally served by competitors. Furthermore, the opposite problem would exist in rural areas where large swaths of land are covered by one zip code. Yet, Mr. Forner's proposal would have both be a violation of the code – regardless of such a rule's over-inclusiveness. The proper behavior and market share depend more on the actual nature and scope of activities including the degree of competition that exists – and less on arbitrary tests unsupported by statute. For example, a new value added service offering could produce 100% market share simply by being first to a narrowly defined market.

Mr. Forner proposes changes to R 460.10110 *et seq.* (Part 5) to have annual or advanced disclosure of value-added services by zip code, size of market, competitors, and financial projects. It is not clear how a utility would necessarily know all of this information. Based on how a market is defined, all competitors may not be known because there could be different services which compete with a particular value-added service or program. A zip code definition does not take into account, national programs and services for which competition may exist. Nor would providing the additional information sought by Mr. Forner's proposal be necessary when providing "notice" of a utility's plans to offer value added programs or services.

Mr. Forner also proposes to change a statutory notice requirement into an informal proceeding resulting in a Commission determination with regard to the value-added service. The Commission acts only through its orders and a determination as to whether a proposed value-added service is proper falls in the category of a contested

case contemplated under MCL 24.203(3). It appears that such an informal proceeding is to become a substitute for a complaint process. Such proposal unlawfully exceeds that which is required under MCL 460.10ee (4). MCL 460.10ee (4) directs notice by a utility and not a determination by the Commission after an "informal" proceeding.

Reply to Comments of Michigan Energy Innovative Business Council

The Michigan Energy Innovative Business Council recommends that the Code of Conduct include a cap on utility affiliate market share. There is simply no statutory basis (in MCL 460.10ee or elsewhere) for such action.

Reply to Comments of Direct Energy, IGS and Constellation

In the proposed changes to Rule R 460.10110 Notification, Direct Energy, IGS and Constellation likewise seek to turn a statutory notification requirement into a determination as to the lawfulness of a proposed value added program. Nothing in MCL 460.10ee provides for prior Commission or Staff approval of proposed value-added programs. Value-added programs are lawful under R 460.10110 and prior permission or authorization is not required or lawful

Direct Energy, IGS and Constellation also propose changes to R 460.10111 *et seq.* to remove from Commission oversight, reporting by and penalties on unaffiliated Alternative Energy Suppliers (AESs). The proposed changes make the Code of Conduct applicable only to utilities and affiliated AESs. The rule changes appear to be at odds with MCL 460.10ee(1)'s direction that the code of conduct established is to be applicable to electric utilities and alternative electric suppliers, consistent with sections 10 through 10cc. More important, Direct Energy's, IGS's, and Constellation's changes would also require utility obligations to also apply to affiliated AESs. The statute does

not grant the Commission this scope of direct regulatory authority over AESs, affiliated or not. These proposed changes must be rejected as exceeding the statute and common sense.

Conclusion

The scope of proposed changes to the Code of Conduct discussed above create practical problems in application making them unenforceable or rife with internal inconsistency and uncertainty. In addition, some of the proposed changes would create an ultra vires and, therefore unlawful, Code of Conduct. Given these problems, the final Code of Conduct should not incorporate the proposed changes discussed above.

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Michigan Energy Innovation Business Council

The Michigan Energy Innovation Business Council (MEIBC) is a public-private partnership that brings together the state's leading energy and technology companies to address the challenges of a sustainable energy future. The council was created by the Michigan Department of Energy and Environment (MDEE) and the Michigan Economic Development Corporation (MEDC) in 2011. Its mission is to develop and implement strategies that will accelerate the growth of the state's energy and technology sectors, while also ensuring that the transition to a sustainable energy future is done in a way that is equitable and just for all Michiganders.

The council's work is organized into four main areas: energy efficiency, renewable energy, energy storage, and smart grids. In each of these areas, the council works to identify key challenges and opportunities, develop strategies to address them, and implement those strategies through a variety of programs and initiatives. The council also works to build a strong network of stakeholders, including government agencies, industry groups, and academic institutions, to ensure that its work is effective and impactful.

One of the council's key initiatives is the Michigan Energy Efficiency Challenge, which is a program that provides financial incentives to businesses and homeowners to improve their energy efficiency. The challenge is designed to encourage businesses and homeowners to invest in energy-efficient technologies and practices, which can help to reduce energy costs and improve the overall sustainability of the state's energy system.

Another key initiative is the Michigan Renewable Energy Challenge, which is a program that provides financial incentives to businesses and homeowners to install renewable energy systems, such as solar panels or wind turbines. The challenge is designed to encourage businesses and homeowners to invest in renewable energy, which can help to reduce greenhouse gas emissions and improve the overall sustainability of the state's energy system.



July 28, 2017

Mr. Derrell Slaughter
Michigan Public Service Commission
7019 West Saginaw Highway
Lansing, MI 48917
By email: slaughterd@michigan.gov

Dear Mr. Slaughter:

The Michigan Energy Innovation Business Council (Michigan EIBC) respectfully submits these reply comments relating to the Michigan Public Service Commission's development of draft rules related to the Code of Conduct for utilities pursuant to Section 10ee of Public Act 341 of 2016, MCL 460.10ee.

As noted in our initial comments, Michigan EIBC believes that there is a role for utilities to play in offering value-added programs and services (VAPS). However, pursuant to both the language and structure of the statute, any such offering of VAPS by utilities or their affiliates should be limited in order to avoid the undue restraint of trade or competition in markets served by competitive providers. On that basis, we are concerned that comments from some utilities and utility groups in this matter would strike the wrong balance, tilting playing field in favor of monopoly interests.

Our concerns arise from both an understanding of the unique position regulated utilities play within our energy landscape and the statutory framework under which utilities may offer VAPS. A delicate balance exists between the monopoly powers granted by the state to regulated utilities and the need to limit such powers from negatively impacting the functioning of competitive markets.

In authorizing utilities to offer VAPS under certain conditions, both the language and the structure of the statute aim to preserve this balance. For example, Section 10ee(2) states that utilities may offer VAPS only "if those programs or services do not harm the public interest by unduly restraining trade or competition in an unregulated market." Section 10ee(2), MCL 460.10ee(2).

In requiring the MPSC to develop a Code of Conduct to govern utility activities in this space, the statute also identifies certain elements of particular concern, including cross-subsidization between regulated and unregulated activities, preferential treatment of unregulated utility affiliates by the regulated entity, and ensuring a level playing field in how information is shared between the utility and any affiliate and between the utility and



a non-affiliated entity. Each of these is central to the statutory objective of avoiding undue restraints on trade or competition. Notably, however, the statute is explicit that this is not an exhaustive list of items to be covered, thereby providing a strong statutory basis for the Commission to go further in promoting the pro-competition objectives of the statute. (See, *e.g.*, Section 10ee(1), MCL 460.10.ee(1), “The code of conduct shall include, *but is not limited to*, measures to prevent cross-subsidization...” (emphasis added).)

Indeed, the whole structure of Section 10ee evinces a desire to strike an appropriate balance between utilities and non-utility energy providers and promote the proper functioning of competitive markets for the provision of unregulated energy products and services.

Turning to specific provisions of the draft rules, Michigan EIBC offers these comments and reactions to the comments of other participants:

PART I. GENERAL PROVISIONS

Michigan EIBC agrees with the comment from the Michigan Electric and Gas Association (MEGA) that Rule 2(a) contains definitions for both “affiliate” and “control,” and that it would be better to separate the definitions into separate provisions.

Michigan EIBC agrees with the Michigan Electric Cooperative Association (MECA) suggestion to clarify the definition of “Alternative electric supplier” in Rule 2(b) as referring to those AESs “licensed by the Commission under Section 10a of 2000 PA 141, as amended” in order to clarify that “alternative electric supplier” does not refer to those third-party providers of energy products and services operating in the unregulated market.

PART 2. SEPARATION OF A UTILITY FROM ITS AFFILIATE AND ALTERNATIVE ELECTRIC SUPPLIERS

Michigan EIBC disagrees with MECA’s revisions to the first sentence of Rule 3(1). MECA’s first change – to require structural or financial separation only for utilities that offer both regulated and unregulated services other than VAPS – lacks any support in statute. Indeed, as noted above, the very purpose of this Code of Conduct is to govern the operations of those utilities that do offer VAPS. Applying the requirements only to those who offer unregulated services “other than VAPS” misreads the statute’s meaning and objective. Furthermore, replacing the term “anticompetitive behavior” with the more specific listing of “cross-subsidization, preferential treatment and information sharing prohibited by these rules” ignores the statute’s clear language that the Code of Conduct include, *but is not limited to*,



those items. Section 10ee(1), MCL 460.10ee(1) (emphasis added). While Michigan EIBC recognizes MECA's objection that "anticompetitive behavior" also implicates antitrust jurisdiction, we again highlight the statutory condition that utilities can offer VAPS only "if those programs or services do not harm the public interest by unduly restraining trade or competition in an unregulated market." Section 10ee(2), MCL 460.10ee(2). Thus, not only does the statute specifically contemplate elements beyond those specifically listed, the focus of the statutory requirement of a Code of Conduct to govern the offering of VAPS by utilities and their affiliates is to ensure the promotion of trade and competition in unregulated markets. For these same reasons, Michigan EIBC disagrees with the revisions to Rule 3(1) proposed by MEGA.

Michigan EIBC agrees with MECA's revision to the second sentence of Rule 3(1).

Michigan EIBC disagrees with the proposal by both MEGA and MECA to remove Rule 3(2). As we noted in our initial comments, "even implicit extension of [a utility's] monopoly position is inappropriate." Allowing a utility to offer VAPS directly, as opposed to through an affiliate, threatens to add confusion to the marketplace. Furthermore, the statute requires – not once, but twice – that a utility offering VAPS inform potential customers that such VAPS are not regulated by the Commission. See Section 10ee(10)(c)(ii) and 100ee(10)(d)(ii), MCL 460.10ee(10)(c)(ii), 460.10ee(10)(d)(ii). It is unrealistic to expect the typical utility customer to identify which services provided by the utility are and are not regulated. Within a utility's monopoly service territory, some form of structural separation is therefore necessary to avoid the confusion that is likely to result from a utility offering both regulated and unregulated services to the same customers within the same service territory.

Michigan EIBC disagrees with MEGA and MECA's proposed revisions to Rule 3(3). Adding the word "financially" as a qualifier, while striking the phrase "in any manner, directly or indirectly," significantly weakens the protections against cross-subsidization that are at the very heart of this Code of Conduct. As noted previously, there are a number of ways that utilities can misuse their unique position to restrain trade or competition in the unregulated market; ensuring robust protections against such infringement should be maintained.

Michigan EIBC believes that the requirement that a utility shall maintain its books and records separately from other entities offering VAPS is best left in the section dealing with corporate separation (Rule 3(4)), as opposed to the section on corporate records (Rule 4).



Michigan EIBC agrees with the change to Rule 5 proposed Direct Energy, IGS Energy, and Constellation (AES Commenters) to require that all costs to provide VAPS be fully embedded to ensure no cross-subsidization.

Michigan EIBC disagrees with the proposed changes by MEGA to Rule 6(1). Again, the whole rationale for a utility Code of Conduct governing the offering of VAPS is to ensure appropriate separation of regulated and unregulated functions, and not to allow a utility to use its position to impair the proper functioning of competitive markets. Requiring that the utility and its affiliates not speak for one another, or to give the appearance of speaking for one another, is central to this concept.

Michigan EIBC disagrees with the proposed changes by both MECA and MEGA to Rule 7. The proposed removal of the clauses "in any way" in Rule 7(1) and "in any manner" in Rule 7(1)(b) weaken the protections against cross-subsidization in the same manner as the proposed changes to Rule 3(3) above. Similarly, the proposed removal of Rule 7(2) seriously undermines the statutory prohibition against cross-subsidization. Non-utility market participants lack the ability to have their financial obligations guaranteed or otherwise supported by utilities (and ultimately, utility ratepayers); allowing for utilities to perform these functions on behalf of affiliates participating in the unregulated market risks seriously distorting the marketplace and providing utilities with an unfair competitive advantage, all while increasing the risk assumed by utility ratepayers. Michigan EIBC suggests add a provision preventing utilities from offering financing or other terms to customers procuring unregulated services that are not available to customers of non-affiliated providers of unregulated energy products and services, consistent with the statutory requirement that the Code of Conduct include measures to prevent preferential treatment. Section 10ee(1), MCL 4601.10ee(1).

PART 3. DISCRIMINATION

Michigan EIBC agrees with the clarification to Rule 8(1) proposed by the AES Commenters (as well as the similar clarification in Rule 6(2)).

Michigan EIBC disagrees with the changes to Rule 8 proposed by MEGA as unnecessary and potentially confusing. Alternative electric suppliers within the utility structure would already be covered by reference to "other entity within the corporate structure." Specifically listing "alternative electric supplier," therefore, could be misread as alternative electric suppliers *not* in the utility's corporate structure, which is not the intent of either the statute or the draft rule.



PART 4. INFORMATION SHARING

Michigan EIBC restates its comment that the information utilized by utility affiliates offering VAPS should also be available to other market participants in the same timeframe, form, and substance. On this basis, Michigan EIBC disagrees with the deletions and other changes proposed by MEGA to Rules 9(4), 9(5), 9(6), and 9(7). To the extent that the Commission limits disclosure to requests from third-parties, the rules should maintain the same timeframe, form, and substance for information sharing within the utility's corporate structure. For example, if the Commission adopts the five-day timeframe contemplated in Section 10ee(10)(a), the rules should call for a five-day "waiting period" for the internal sharing of that information within the utility's corporate structure to ensure that utilities are not unduly advantaging their affiliates through instantaneous sharing of customer lists where non-affiliates have to wait for up to five days.

Michigan EIBC also disagrees with the change to Rule 9(3) proposed by MEGA.

PART 5. REPORTING, OVERSIGHT, AND PENALTIES

Michigan EIBC disagrees with the proposal from MEGA to eliminate Rule 10(1)(b).

Michigan EIBC disagrees with the proposal from both MEGA and MECA to eliminate Rule 10(3). Indeed, to ensure a fair playing field and eliminate the possibility of market distortions between a utility and its affiliates, Michigan EIBC would propose that any move to sell or transfer an asset with a market value of \$1,000,000 or more connected with the offering of VAPS should allow other, non-affiliated entities to bid on the asset. Such a requirement would ensure accurate accounting of the value of assets, and allow for other market participants to have the same access to utility assets as utility affiliates.

Michigan EIBC agrees with the AES Commenters on the clarification to the Oversight provisions of Rule 11.

Michigan EIBC disagrees with MECA and MEGA's proposed eliminations and revisions to the reporting requirements contained in Rule 12. Ensuring full reporting of utility VAPS is essential to maintaining competition and avoiding the improper extension of a utility's monopoly position into the unregulated market.

Michigan EIBC restates its original comment that utility officer should be required to file annual affidavits of compliance with the Code of Conduct.



Michigan EIBC thanks the Michigan Public Service Commission for its thoughtful process relating to the development of formal rules to implement the Code of Conduct governing utilities offering VAPS. We look forward to continued engagement on this issue, and to working to meet the statutory objective of promoting trade and competition in the unregulated markets for energy products and services.

Sincerely,

A handwritten signature in black ink, appearing to read 'Liesl Eichler Clark', is positioned below the 'Sincerely,' text. The signature is fluid and cursive, with a long horizontal line extending to the right.

Liesl Eichler Clark
President
Michigan Energy Innovation Business Council

Michigan Electric and Gas Association



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July 28, 2017

Mr. Derrell Slaughter
Michigan Public Service Commission
7019 W. Saginaw Highway
Lansing, MI 48917

Via email to: slaughterd@michigan.gov

Re: Code of Conduct Draft Rule Proposal

Dear Mr. Slaughter:

Accompanying this letter are joint reply comments of Consumers Energy Company, DTE Electric Company, DTE Gas Company and the Michigan Electric and Gas Association on the draft rules for code of conduct.

Please contact us if you have any questions and thank you for your work and assistance in this matter.

Very truly yours,

MICHIGAN ELECTRIC AND GAS ASSOCIATION

James A. Ault
President

cc: DTE Electric Company
DTE Gas Company
Consumers Energy Company
MEGA Member Companies

Alpena Power Company
Aurora Gas Company
Citizens Gas Fuel Company

Indiana Michigan Power Company
Michigan Gas Utilities
SEMCO Energy Gas Company

Upper Peninsula Power Company
We Energies
WEC Energy Group
Xcel Energy

REPLY COMMENTS OF MICHIGAN REGULATED ENERGY PROVIDERS

The Providers, as described in their initial comments on the draft code of conduct (Proposed Rule), reply to comments submitted by other interested parties, through these joint reply comments.

Some of the comments and changes to the Proposed Rule of other interested parties go right to the heart of the legal and practical limits applicable to administrative rules, discussed in the Providers' initial comments. Adopting the proposals challenged below will create legal uncertainty as to the validity of the final rules and give rise to more controversy and possible challenges.

Rubber Stamp Approval: Direct Energy/IGS/Constellation (AES Group)

propose a 60-day advance filing and Staff approval process in changes to Rule 10(1).

There are multiple problems with this proposal:

- The statute does not contemplate MPSC "prior approval" of VAPS at all, let alone any "rubber stamp". The statute imposes specific requirements on the utility's VAPS program and authorizes MPSC enforcement of the requirements. VAPS are allowed to proceed, subject to the statutory restrictions and possible enforcement review. This comment also applies to Mr. Philip Forner's proposed changes to Rule 10(2) which appears to request a regulatory determination as an automatic requirement for each noticed offering.
- The 60-day delay is not authorized by the statute and creates an arbitrary limit. There could be no comprehensive or meaningful agency review of issues within that short span of time. The limit would, in effect, grant equitable power to the MPSC Staff to halt a program before it begins. This comment also applies to Mr. Philip Forner's proposal for a 90-day advance notification requirement.
- The change assigns a prior review and approval function to the agency staff, without the MPSC making any determination. This is unlawful as contrary to the

statute, which does not require an advance review and compliance process at the agency. The Staff does not have legal authority to act for the MPSC.

Affiliate Regulation: The AES Group proposes multiple changes to Rule 11 on oversight, regarding documents, complaints and dispute resolution, to make the requirements for utilities also applicable directly to unregulated affiliates providing unregulated products or services. The statute does not give the MPSC this degree of authority over the unregulated utility affiliates. Provisions in MCL 460.10ee(1) are aimed at preventing cross-subsidization, preferential treatment and certain information sharing between a utility and an affiliate offering VAPS. The proposed change goes too far by incorporating direct regulation of the affiliates.

Anticompetitive Behavior: Mr. Forner proposes a definition of anticompetitive behavior added to Rule 2 which is too broad, enlarges the statutory limits and is unworkable, for these reasons:

- The first sentence is unnecessary because the statute adequately describes the limits on cross-subsidization or preferential treatment regarding VAPS.
- The phrase "any activity or result that leads to" in that first sentence is overly broad, vague and ambiguous. Such language could lead to pointless litigation and fails to adequately describe the scope of limitation.
- The second sentence also unlawfully expands the statutory restrictions by creating an arbitrary 10% market share cap and defining the relevant market as a zip code area. Such a market share could, in a given situation, be captured by entirely appropriate competitive actions. Why is a zip code area the relevant market, versus, say the State of Michigan, or Ingham County or Greater Lansing? These matters will vary based on the nature and scope of a VAPS offering and the degree of competition that exists.
- Further comment on the proposed 10% limit: such a market share and more might be obtained if a specific offering has few or no competitors. These